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April 9, 1999

BY OVERNIGHT MAIL

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W. -- Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 99-68

Dear Ms. Salas:

Enclosed for filing please find an original plus nine (9) copies of the Comments of Frontier Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: Ms. Wanda Harris (paper plus diskette)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	**CC Docket No. 99-68**
Inter-Carrier Compensation	)	
for ISP-Bound Traffic	)	

COMMENTS OF FRONTIER CORPORATION

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April 9, 1999

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Summary

First, the Commission is correct in its conclusion that, as a general matter, ISP-bound traffic is jurisdictionally interstate. Such a conclusion is completely consistent with past Commission precedent because it recognizes the end-to-end nature of a communication. In this regard, the Commission has requested comment on whether it is possible to segregate intrastate and interstate ISP-bound traffic. As a practical matter, it is not. Due to the nature of such traffic, the precise location of the distant connection or connections is virtually impossibly to define and determine. As such, the Commission should declare that all such traffic is jurisdictionally interstate.

Second, the Commission should not adopt its tentative conclusion that inter-carrier compensation be subject to state-supervised interconnection negotiations under sections 251 and 252 of the Act. The reciprocal compensation obligation contained in section 251(b)(5) only applies to *local* traffic, not interstate or even intrastate toll traffic. Thus, under sections 2(a), 251 and 252, state commissions lack jurisdiction to approve or enforce agreements that govern interstate traffic. In addition, as a matter of constitutional law, the Commission cannot force states to act as the Commission's enforcement or policy-making arm. Finally, such a proposal would constitute unsound public policy.

Third, the Commission should establish a federal policy governing compensation for ISP-bound traffic. Such a policy should recognize that some

compensation for terminating ISP-bound traffic is appropriate. That policy should also recognize the uniquely one-way nature of this traffic. However, the Commission should constrain the bounds of any negotiation process that it may establish. In particular, the Commission should not permit ILECs to negotiate different switched access rates in exchange for favorable agreements on compensation for ISP traffic and should not intertwine state negotiations with any permitted negotiations over compensation for ISP-bound traffic. Finally, the Commission should not adopt any system that attempts to preclude judicial review.

Before the
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In the Matter of	)	
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Inter-Carrier Compensation	)	
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COMMENTS OF FRONTIER CORPORATION

Introduction

Frontier Corporation ("Frontier"), on behalf of its incumbent local exchange, competitive local exchange, interexchange and Internet services subsidiaries, submits these comments in response to the Commission's Notice initiating this proceeding.[1] Any Commission decision in this proceeding will affect Frontier in numerous different ways. Today, its incumbent local exchange carriers ("ILECs") -- principally, Frontier Telephone of Rochester, Inc. -- pay to unaffiliated competitive local exchange carriers ("CLECs") significant sums in reciprocal compensation for ISP-bound traffic. Its CLEC operations do not operate for the purpose of collecting reciprocal compensation and, indeed, in many jurisdictions, Frontier made the conscious decision not to arbitrate ILEC proposals to exclude ISP-bound traffic from the reciprocal compensation

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Dkts. 96-98 & 99-68, Declaratory Ruling in CC Docket No. 96-68 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (Feb. 26, 1999).

The declaratory ruling portion of the referenced document is referred to herein as "Declaratory Ruling." The notice of proposed rulemaking portion is referred to herein as "Notice."

provisions of its interconnection agreements. Frontier made this decision in order both to expand its facilities-based CLEC operations quickly and to provide real competitive offerings to customers. Frontier's Internet and interexchange businesses have a clear interest in the policy issues implicated by this proceeding. Because of Frontier's balance of competing interests, it is able to offer the Commission a unique perspective on the issues that the Commission has noticed for comment.

First, the Commission is correct in its conclusion that, as a general matter, ISP-bound traffic is jurisdictionally interstate.[2] Such a conclusion is completely consistent with past Commission precedent because it recognizes the end-to-end nature of a communication. In this regard, the Commission has requested comment on whether it is possible to segregate intrastate and interstate ISP-bound traffic.[3] As a practical matter, it is not. Due to the nature of such traffic, the precise location of the distant connection or connections is virtually impossibly to define and determine. As such, the Commission should declare that all such traffic is jurisdictionally interstate.

Second, the Commission should not adopt its tentative conclusion that inter-carrier compensation be subject to state-supervised interconnection negotiations under sections 251 and 252 of the Act.[4] The reciprocal compensation obligation contained in section 251(b)(5) only applies to *local*

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2 Declaratory Ruling, ¶¶ 13, 18.

3 Notice, ¶ 31.

4 *Id.*, ¶ 30.

traffic, not interstate or even intrastate toll traffic. Thus, under sections 2(a), 251 and 252, state commissions lack jurisdiction to approve or enforce agreements that govern interstate traffic. In addition, as a matter of constitutional law, the Commission cannot force states to act as the Commission's enforcement or policy-making arm. Finally, such a proposal would constitute unsound public policy.

Third, the Commission should establish a federal policy governing compensation for ISP-bound traffic.[5] Such a policy should recognize that some compensation for terminating ISP-bound traffic is appropriate. That policy should also recognize the uniquely one-way nature of this traffic. However, the Commission should constrain the bounds of any negotiation process that it may establish.[6] In particular, the Commission should not permit ILECs to negotiate different switched access rates in exchange for favorable agreements on compensation for ISP traffic and should not intertwine state negotiations with any permitted negotiations over compensation for ISP-bound traffic.[7] Finally, the Commission should not adopt any system that attempts to preclude judicial review.[8]

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5 *Id.*, ¶ 31.

6 *Id.*, ¶¶ 30-31.

7 *Id.*, ¶ 29.

8 *Id.*, ¶ 32.

Argument

I. ISP-BOUND TRAFFIC IS JURISDICTIONALLY INTERSTATE.

In the Declaratory Ruling, the Commission correctly concludes that at least some ISP-traffic -- based upon the end-to-end nature of the communication -- is jurisdictionally interstate.[9] In reaching this conclusion, the Commission properly rejects the so-called two-step approach that would break a transmission into its component parts.[10] The *Teleconnect* decision[11] stands for this proposition and the Commission has correctly chosen not to deviate from it. Frontier agrees that it is not practical to segregate such traffic.[12] Unlike the traditional circuit-switched model, the termination point of an ISP-bound call can best be considered a logical cloud with no discreet jurisdictional nexus. As the Commission notes:

> The jurisdictional analysis is less straightforward for the packet-switched environment of the Internet. An Internet communication does not have a point of "termination" in the traditional sense. An Internet user typically communicates with more than one destination point during a single Internet call, or "session," and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside in servers in various states or foreign countries . . . Further complicating the matter of

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9 Declaratory Ruling, ¶¶ 10-20.

10 *See id.*, ¶¶ 11, 13.

11 *See Teleconnect Co. v. Bell Telephone Co. of Pennsylvania*, File E-88-83, 10 FCC Rcd. 1625 (1995), *aff'd sub nom. Southwestern Bell Telephone Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997)

12 Declaratory Ruling, ¶ 19.

> identifying the geographic destinations of Internet traffic is that the content of popular websites increasingly are being stored in multiple servers throughout the Internet, based on "caching" or website "mirroring" techniques.[13]

In these circumstances, the Commission should declare that *all* such traffic is jurisdictionally interstate. Such a conclusion would not only recognize that a substantial portion of such traffic in fact terminates in a location different than the state of origination, it would also be entirely consistent with past Commission practice. Because of the impracticality of measuring usage over special access lines, the Commission treats the entire special access facility as jurisdictionally interstate if the customer certifies that more than ten percent of such traffic is interstate in nature.[14] The same rationale applies here. The impracticality of measuring such traffic compels the Commission to declare that all such traffic is jurisdictionally interstate.

II. THE COMMISSION SHOULD NOT RELY UPON THE SECTION 251/252 NEGOTIATION AND ARBITRATION PROCESS TO DETERMINE COMPENSATION FOR ISP-BOUND TRAFFIC.

The Commission requests comment upon whether it should rely upon the negotiation/arbitration process set forth in sections 251/252 of the Act to

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13 Declaratory Ruling, ¶ 18.

14 *See MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd. 5660 (1989).

determine the appropriate level of compensation for ISP-bound traffic.[15] The Commission should decline to adopt this proposal for three reasons: (1) it is beyond the jurisdiction granted to state commissions under sections 251 and 252 of the Act; (2) it is precluded by principles of dual sovereignty; and (3) it would constitute inappropriate public policy in any event.[16]

A. State Commissions Lack Jurisdiction To Establish Compensation Rates for Jurisdictionally Interstate Traffic.

Sections 251 and 252 of the Act entrust to state commissions the responsibility for overseeing the negotiation and arbitration process that governs the items specified therein. Among those items is compensation for the transport and termination of "telecommunications."[17] The Commission has previously determined that this provision applies only to "*local* telecommunications traffic."[18] There should be no question that this decision is correct. As the Commission notes:

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15 Notice, ¶ 30.

16 Frontier notes that the Commission has decided, for the time being, to treat compensation for ISP-bound traffic under existing state-supervised interconnection agreements. Declaratory Ruling, ¶¶ 24-25. This aspect of the Declaratory Ruling is subject to petitions for review. As a result of the pendency of these petitions for review, Frontier is explicitly *not* seeking reconsideration of the Declaratory Ruling.

17 See 47 U.S.C. § 251(b)(5).

18 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16013 (1996), *rev'd and vacated in part sub nom. Competitive Telecommunications Ass'n. v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *rev'd and vacated in part sub nom. Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1977), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

> Section 251 makes clear that interstate traffic is subject to the Commission's jurisdiction under Section 201.[19]

Indeed, the Commission's proposal presents *Louisiana PSC*[20] in reverse. If, as *Louisiana PSC* teaches, section 2(b) "fences off" the Commission from intrastate matters, then section 2(a) equally fences off the states from interstate matters unless Congress has legislated otherwise in an area within its constitutional competence.[21]

The Commission's proposal advanced in this proceeding would breach that fence. It would entrust to the states matters that the Communications Act reserves *exclusively* to the Commission. It would permit state commissions -- without any oversight by this Commission[22] -- to oversee the rates, terms and conditions of interstate offerings. In addition to the undesirable policy consequences of the Commission's proposal,[23] state commissions simply lack the jurisdiction under sections 251 and 252 to oversee such a regime.[24]

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19 Notice, ¶ 7 n.22.

20 *Louisiana PSC v. FCC*, 476 U.S. 35 (1986).

21 Section 2(a) provides that: "The provisions of this chapter apply to *all* interstate and foreign communications by wire or radio. . . ." 47 U.S.C. § 152(a) (emphasis added).

22 State commission decisions with respect to interconnection agreements are reviewable only in the federal district courts. *See* 47 U.S.C. § 252(e)(6).

23 See Part II.C, *infra*.

24 Because state commissions lack this authority, they plainly may not arbitrate and ultimately decide the rates, terms and conditions that may appear in interconnection agreements, but that extend to interstate services. If the Commission's line of reasoning were taken to its logical conclusion, state commissions would have the authority to vary exchange carriers' interstate access tariffs, because such a provision was contained in a state-arbitrated interconnection agreement.

In short, even if the Commission could adopt such a regime, state commissions would be powerless to implement it.

B. Constitutional Principles of Dual Sovereignty Render the Commission's Proposal Constitutionally Infirm.

Several provisions of the United States Constitution confirm that the federal and state governments were established as dual sovereigns, each -- subject to the Supremacy Clause -- sovereign in their respective spheres.[25] On this basis, the Supreme Court in *Printz* invalidated those provisions of the Brady Act that purported to compel state and local law enforcement officials to enforce certain of its provisions. The Court held:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring States to address particular problems, nor command the States' officers, or those of their political subdivisions to administer or enforce a federal regulatory program.[26]

The same rationale applies to voluntarily-negotiated agreements. *First*, these agreements are also subject to state commission approval and if a state commission cannot arbitrate an agreement that contains terms and conditions beyond the state commission's jurisdiction, it similarly cannot provide its *imprimatur* upon a voluntarily-negotiated agreement that contains the same infirmity. *Second*, such agreements could also run afoul of the filed-rate doctrine. To the extent an interconnection agreement purported to vary the rates, terms and conditions contained in an interstate access tariff, such an agreement would be unenforceable to that extent. *See American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 118 S. Ct. 1956 (1998).

25 *See generally Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

26 *Printz*, 1997 U.S. LEXIS 4044 at 63-64.

The Commission's proposal runs afoul of this proscription. Under the proposal, the Commission would conscript state officers to administer and enforce a *federal* program -- compensation for the transport and termination of jurisdictionally interstate traffic. It would enmesh the states in a matter -- the regulation of interstate commerce -- over which the states have no authority. As such, the Commission may not adopt this proposal.

C. The Commission's Proposal Constitutes Unsound Public Policy in Any Event.

Even if the Commission could adopt or the states could implement the Commission's proposal, it would constitute unsound public policy.

The Commission's proposal would create inappropriate incentives the results of which could severely damage market participants that would be strangers to any particular negotiation/arbitration proceeding. This may occur in several ways, a few examples of which will suffice. A large interexchange carrier with a CLEC presence may find it desirable to agree to no compensation for ISP-bound traffic in exchange for agreed-to reductions in interstate switched access charges. The results in the interexchange market would be fairly predictable. One competitor would gain a significant cost advantage over its rivals as a result of bargaining strength only rather than any inherent business acumen of its own.

A large exchange carrier may agree to waive end-user common line charges or otherwise provide free or reduced-price interstate services to retain the business of an ISP, to the detriment of other CLECs.

In each of these cases, competitive distortions affect third parties that are strangers to the negotiation/arbitration process.

Moreover, state commissions would have little or no incentive to police such practices. The financial consequences to the adversely-affected entity would be felt in the interstate jurisdiction and would therefore have minimal or no consequences on other intrastate interests, principally, local telephone ratepayers.

At bottom, the Commission's tentative conclusion that negotiation is the most efficient process for determining the rates, terms and conditions of inter-carrier compensation,[27] is incorrect, As described above, it simply ignores the collateral consequences on third parties that are strangers to the process. In the context of the current regime governing compensation for ISP-bound traffic, that is precisely the problem. Involuntary third parties -- *i.e.*, ILECs -- are forced to pay through reciprocal compensation for business arrangements -- between CLECs and ISPs and ISPs and end users -- to which they are strangers.

Finally, the current regime -- and the Commission's proposal to continue the *status quo* -- serve neither the interests of competition nor consumers. Single-service CLECs exist only to collect reciprocal compensation. Whatever the merits of the business case of such an approach, it certainly does not provide consumers with new, cost-effective alternatives to meet their

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[27] Notice, ¶¶ 29-30.

telecommunications needs. And, as described above, it distorts -- rather than enhances -- the competitive process.

III. THE COMMISSION SHOULD ESTABLISH A FEDERAL REGIME GOVERNING INTER-CARRIER COMPENSATION FOR ISP-BOUND TRAFFIC.

The Commission cannot establish a state-governed regime for governing compensation for ISP-bound-traffic. It should, therefore, establish a federal regime governing compensation for ISP-bound traffic. Such a policy should recognize that: (a) the current system creates perverse incentives; (b) ISP-bound traffic is essentially one-way traffic; and (c) ISP-bound traffic causes the terminating carrier to incur some costs for which such carrier should be fairly, but reasonably, compensated.

Taking these considerations into account, Frontier proposes that the Commission adopt a policy that contains the following essential provisions.

First, the Commission should establish a benchmark terminating compensation rate for ISP-bound traffic at some fraction (perhaps, one-quarter) of the local switching unbundled network element rate. *Second*, the Commission should decree that bill-and-keep apply for all ISP-terminating traffic when the overall origination/termination ratio is severely out-of-balance (perhaps, 30/70). *Third*, the Commission should not permit parties to depart from the terms of their interstate tariffs in negotiating alternative arrangements governing compensation for ISP-bound traffic.

A federal policy along the lines suggested above will generate several important public-policy benefits. *First*, it will -- as the Commission

acknowledges[28] -- recognize that carriers do incur costs in terminating ISP-bound traffic for which they should receive compensation.

Second, the bill-and-keep provision governing traffic that is severely out of balance in the aggregate would minimize the incentives for CLECs to focus solely on attracting customers with a vast preponderance of terminating minutes. As described above, this business approach simply introduces distortions into the competitive marketplace. It requires one company to subsidize another by paying for transactions to which the subsidizing company is a stranger. This results only in a wealth transfer, but generates no corresponding consumer welfare gains. This situation penalizes not only ILECs, but also CLECs that are offering consumers new services and competitive alternatives. The Commission should discourage, not encourage, this type of market behavior. Bill-and-keep for severely out-of-balance traffic achieves this result. It provides a mechanism for compensation for the transport and termination of traffic, yet, at the same time, it does not reward terminating-only CLECs that produce no consumer welfare gains.

Finally, by constraining the ability of parties -- particularly ILECs -- to vary the terms of other interstate offerings in negotiations, the Commission would prevent the creation of competitive distortions in adjacent markets. The

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[28] Notice, ¶ 29.

Commission's tentative conclusion[29] that negotiation would lead to efficient outcomes is, in this context, incorrect. Such a process -- if left unconstrained -- would produce serious external diseconomies because the costs of such negotiations would be borne principally by third parties that are strangers to any particular negotiation/arbitration proceeding. To prevent this result, the Commission should preclude local exchange carriers from varying the terms of their interstate tariffs -- particularly, ILEC interstate access tariffs -- in the context of negotiations concerning compensation arrangements for ISP-bound traffic.[30]

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29 Notice, ¶ 29

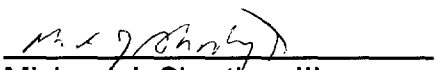
30 While Frontier has no objection to parties agreeing to alternative forms of compensation for ISP-bound traffic (*id.*, ¶ 33), latitude in negotiations should be limited solely to that subject. Moreover, any such arrangements should be filed in interstate tariffs and made available to other, similarly-situated entities. *See id.*, ¶ 35.

The Commission should not attempt to adopt a regime that would preclude aggrieved parties from seeking judicial review. The very notion is offensive to principles of due process.

Conclusion

For the foregoing reasons, the Commission should act upon the proposals contained in the Notice in the manner suggested herein.

Respectfully submitted,



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